

## SELF DEFENSE AND THE UNINTENDED VICTIM

Rick Miller, Deputy Legal Defender

Feeling threatened, your client fires a preemptive volley, missing his target and striking an unintended victim. The government's allegation of murder is grounded in the age-old doctrine of transferred intent. The defendant will not escape responsibility where the intended harm differs from the actual harm merely because a different person was injured or killed. A.R.S. §13-203(B)(1); *State v. Rodriguez-Gonzales*, 164 Ariz. 1, 790 P.2d 287 (App.1990). Will your client's defensive measures also travel with the bullet, or is he automatically liable for his justified act of self-preservation because an unintended victim was caught in the cross-fire?

The answer is mixed. To the extent that he fired in self-defense, he is not guilty of crimes involving the mental state of intent or knowledge. However, depending on the level of care he used in response to the perceived threat, he may be accountable on theories of reckless or negligent criminal behavior for the harm inflicted on the innocent bystander.

### I. ARIZONA LAW

This issue has been presented to the Arizona appellate courts on only one occasion. In *Mayweather v. State*, 29 Ariz. 460, 242 P. 864 (1926), the defendant accidentally shot his friend while embroiled in a shoot-out with another person named Alvin Downs. The court conducted the trial "as though appellant had taken the life of Downs, the person at whom he shot," 242 P. at 864, and instructed the jury that, "[i]f the defendant fired at Downs and the bullet which he fired killed [the deceased], he is either liable or excusable in the same manner as though the bullet which he fired had killed Downs." *Id.* at 864, 865. The Arizona Supreme Court found this instruction to be "a correct statement of the law." *Id.*, at 865. *Mayweather*, however, predates our current criminal code by

nearly one-half century, and the opinion did not address whether the defendant could have been responsible under reckless and negligent theories of homicide. Under A.R.S. §13-401, these lesser levels of *mens rea* are applicable.

Even though a person is justified under this chapter in threatening or using physical force or deadly physical force against another, if in doing so such person recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.

A.R.S. § 13-401(A) (emphasis added).

This statute does not abolish the *Mayweather* doctrine of transferred self-defense. It merely tempers the transfer, imposing liability for the reckless, and presumably negligent, use of justifiable force against another. Prosecutors who argue that A.R.S. §13-401(A) prohibits self-defense in all cases involving unintended victims ignore the plain language of the statute and overlook the history behind the legislation. The defense of justification is available for crimes involving harm to third parties, but the defendant may be prosecuted for his reckless or negligent use of that defense.

## II. THE MODEL PENAL CODE

Most of Arizona's criminal code, including A.R.S. §13-401, is derived from the Model Penal Code. *State v. Willoughby*, 181 Ariz. 530, 892 P.2d 1319 (1995).

When the actor is justified . . . in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded . . . is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

MPC and Commentaries, Part I, § 3.09(3) (1962). Our courts frequently look to the MPC to interpret Arizona criminal statutes. *State v. Weinstein*, 182 Ariz. 564, 898 P.2d 513 (App. 1995); *State v. Cid*, 181 Ariz. 496, 892 P.2d 216 (App. 1995). The commentary to this section illustrates that its intent is to allow prosecutions for recklessness or negligence to go forward, while at the same

time allowing for the transference of self-defense for crimes involving intent and knowledge:

**Risk of Injury to Innocent Persons.** Subsection (3) deals with the case where the actor is justified in using force against the person of another but recklessly or negligently creates the risk of injury of innocent persons at the same time. Such recklessness or negligence may in some cases preclude any justification under the Model Code. But even when the force is deemed justifiable with respect to its target, the claim may be advanced that the actor was reckless or negligent with respect to others.

The object of Subsection (3) is to preserve the possibility of lodging such a charge. Thus, an actor who believed that deadly force was necessary in order to preserve his own life could be prosecuted for his reckless or negligent endangering of other lives during the course of saving his own. . . . The justifying incident, in other words, does not provide the occasion for reckless or negligent conduct towards innocent persons.

Model Penal Code § 3.09, commentary at 154 (1962).

Sensibly, then, a person may defend himself against the force of another, but must do so with prudence and caution. To the extent that he recklessly or negligently hurts innocent people, he can be prosecuted for reckless or negligent crimes. The underscoring policy of § 3.09 was discussed in academic circles following the acquittal of Bernhard Goetz:

The MPC makes certain justification defenses -- including self-defense -- unavailable in prosecutions for reckless or negligent offenses against bystanders. . . . Section 3.09(3) is based on the idea that the rights of bystanders must be balanced against an individual's privilege to use force. The balance struck by the MPC, as well as by the common law, is that the incident justifying the use of force does not provide a legitimate ground for negligent or reckless conduct toward bystanders.

Barlow, Ann E., *Self-Defense and Reckless Crimes Against Third Parties: Has New York Forgotten Innocent Bystanders?*, Columbia J. of Law & Social Problems, 22:417, at 423 (1989).

### III. OTHER JURISDICTIONS AND AUTHORITIES

The Model Penal Code and A.R.S. § 13-401 were not the first authorities to discuss these competing interests. The principle has early 20<sup>th</sup> century roots:

If, in the justifiable defense of himself against apparent danger of death or serious bodily injury, a party unintentionally or accidentally injures a bystander, the exigency

excuses the act, and he is guilty of no offense, provided it was in a proper and prudent exercise of self-defense.

Warren, Oscar Leroy, *Warren On Homicide*, Vol.I, § 164 (1914). *See also Wharton's Criminal Law*, § 136 ("If, in performing the lawful act of using deadly force to defend himself, the defendant misses his assailant and kills an innocent bystander, this would constitute an 'excusable homicide,' provided the defendant was not guilty of criminal negligence in performing the act.").

More modern criminal law authorities have echoed this principle:

If A in proper self-defense aims at his adversary B but misses B and unintentionally strikes innocent bystander C, he is not liable for C's injury or death. But the result is otherwise if under all the circumstances . . . A was reckless with regard to C. In such a case he would be liable for battery if he merely injures, involuntary manslaughter if he kills, C.

LaFave, Wayne R., *Substantive Criminal Law*, Vol.I, § 5.7(g) (1996).

Throughout the United States, courts consistently recognize that self-defense excuses the conduct of the defendant accused of intentionally or knowingly injuring the innocent third party, while holding him responsible for the reckless or negligent harm he causes. Ferdinand Tinio, Annotation, *Unintentional Killing of or Injury to Third Persons During Attempted Self-Defense*, 55 A.L.R.3d 620 (1974); *People v. Levitt*, 203 Cal.Rptr. 276, 156 Cal.App.3d 500 (1984) (just as one's criminal intent follows the corresponding criminal act to its unintended consequences, so too one's lack of criminal intent follows the corresponding *non*-criminal act to its unintended consequences); *People v. Mathews*, 154 Cal.Rptr. 628, 91 Cal.App.3d 1018 (1979) (doctrine of self-defense is available to insulate one from criminal responsibility where his act, justifiably in self-defense, inadvertently results in the injury of an innocent bystander); *Pinder v. State*, 8 So. 837 (Fla. S.Ct. 1891) (unintended killing of innocent bystander excusable if person fired in the proper and prudent exercise of self-defense); *State v. Phillips*, 583 S.W.2d 526 (Mo. S.Ct., 1979) (self-defense instruction appropriate where

seven-year-old “tragic victim of this whole senseless affair” was killed in cross-fire); *State v. Hamilton*, 557 P.2d 1095 (N.M. S.Ct. 1976) (approving instruction that “intent would transfer unless you find as a fact that the defendant acted in self-defense”); *Juarez v. State*, 886 S.W.2d 511 (Tex. App. 1994) (self-defense instruction appropriate where defendant shot at group of people, killing innocent woman who stood behind the crowd); *Brunson v. State*, 764 S.W.2d 888 (Tex.App. 1989) (defendant, who aimed at one person but shot and killed his 13-year-old daughter, entitled to self-defense plea).

#### IV. CONCLUSION

Persons who fire in self-defense must do so in a non-reckless, carefully measured fashion. A.R.S. § 13-401 precludes justification as a defense to prosecutions for reckless conduct which results in the injury or killing of innocent third parties. The plain language of the statute, the Model Penal Code, and the other authorities discussed above demonstrate, however, that justification is a viable defense that transfers to the unintended victim for crimes such as first degree murder and intentional aggravated assault.